Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1196

COUNTY OF THURSTON, STATE OF NEBRASKA,

Petitioner,

vs.

CECIL ANDRUS, SECRETARY OF INTERIOR, UNITED STATES OF AMERICA, WYMAN A. BABBY, AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR, and FLOYD R. THIEMAN, ACTING SUPERINTENDENT, WINNEBAGO AGENCY BUREAU OF INDIAN AFFAIRS, and THE OMAHA TRIBE OF INDIANS and THE WINNEBAGO TRIBE OF INDIANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Pages
Opinions	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
Conclusion	15
Appendix A	App. 1
Appendix B	App. 54

CASES CITED

Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565 (1912)	10, 11
McClanahan v. Arizona Tax Commission, 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973)	10, 12
Mescalero Apache Tribe v. Jones, 411 U. S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973)	10, 12
Squire v. Capoeman, 351 U. S. 1, 76 S. Ct. 611 (1956)	12

STATUTES CITED

25 USC 331, et seq.	2, 4
25 USC 461, 462	13
28 USC 1254 (1)	2

STATUTES CITED—Continued

	Pages
28 USC 1291	4
28 USC 1331	4
28 USC 1361	4
Sec. 77-1862 (2) R. R. S. Neb. 1943	14

TREATIES CITED

The Brown Act—Act of May 6, 1910, 36 Stat. 348 c. 202	4, 7
The Stephens Act—Act of December 30, 1916, 39 Stat. 865 c. 10	4, 7
Treaty with the Winnebago Indians of March 8, 1865, 14 Stat. 671	11
Treaty with the Omaha Indians of March 6, 1865, 14 Stat. 667	11
Treaty with the Winnebago Indians of April 15, 1859, 12 Stat. 1101	11
Treaty with the Winnebago Indians of February 27, 1855, 10 Stat. 1172	11
Treaty with the Omaha Indians of March 16, 1854, 10 Stat. 1043	11
Treaty with the Winnebago Indians of October 13, 1846, 9 Stat. 878	11

CONSTITUTION CITED

Fifth Amendment, Constitution of the United States	3

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The County of Thurston, State of Nebraska, the Petitioner herein, prays that a Writ of Certiorari issued to review the judgment of the Court of Appeals of the Eighth Circuit entered in the above entitled case on November 6, 1978.

OPINIONS

The opinion of the Court of Appeals of the Eighth Circuit is reported at 586 F. 2d 1212 (1978) and is printed in Appendix A hereto, infra, Page App. 52. The judgment of the Circuit Court of Appeals for the Eighth Circuit is printed in Appendix A hereto, infra, Page App. 21). The opinion of the District Court of Nebraska is unreported, was entered January 7, 1976 and is printed in Appendix A hereto, infra, Page App. 1. The Journal Entry of Judgment of the District Court of Nebraska was entered July 7, 1977 and is printed in Appendix A hereto, infra, Page App. 21.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit (Appendix A infra, Page App. 52) was entered on November 6, 1978. Jurisdiction of the Supreme Court is invoked under Section 28, USC 1254 (1).

QUESTIONS PRESENTED

I. Whether the General Allotment Act of 1887, Sec. 24, Stat. 388, as amended, 25 USC 331, et seq., provides the Indian Allottee with a vested property right, freedom from taxation on the allotted land, so as to place it beyond the power of Congress to specifically authorize state

taxation thereof without consent of the allottee when such tax authorization reserves the statutory freedom from encumbrance set out in the allotment act.

II. Whether tax monies collected by the Secretary of Interior and his agents in Special Deposit Accounts for payment of taxes, which monies were collected pursuant to the consent of the Indian allottee and which monies the Secretary of Interior has a Congressional mandate to disperse to the County levying the taxes under the Brown-Stephens Acts, but which were wrongfully paid out by the Secretary of Interior at the request of said Indian allottees can be replaced with other funds of the Indian allottees arising from later rents, which come into the possession of the Secretary of Interior, and thereafter be paid out to the County for taxes which otherwise would have been paid, but for the wrongful dispersal of the original taxes.

III. Whether the Statute of Limitation on the collection of taxes under the Brown-Stephens Acts is a three year or fifteen year Statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It also involves three statutes of the United States: the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 USC 331, et seq., set forth in Appendix B, infra, Page App. 54; and two uncodified Statutes. The Brown Act—Act of May 6, 1910, 36 Stat. 348 c. 202. The Stephens Act—Act of December 30, 1916, 39 Stat. 865 c. 10, both of which are found in Appendix B, infra, at Pages App. 62 and App. 63, respectively.

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STATEMENT OF THE CASE

This is a mandamus action originally brought by Thurston County in the United States District Court for the District of Nebraska against the Secretary of Interior and various officers and employees of the Bureau of Indian Affairs, Department of Interior. Jurisdiction was invoked under 28 USC 1331 and 28 USC 1361. The Omaha Tribe of Indians and Winnebago Tribe of Indians were granted leave to intervene as Defendants. After trial, judgment was entered by the District Court and Petitioner appealed under 28 USC Sec. 1291 to the Court of Appeals for the Eighth Circuit for review of whose opinion and judgment this Petition is brought.

In its action The County of Thurston sought to recover $359,598.15 in unpaid and delinquent taxes assessed on lands held under trust patents by individual allottees of the Omaha and Winnebago Tribes in the State of Nebraska, which taxes were imposed pursuant to authority granted by two uncodified Statutes, The Brown Act of 1910 and the Stephens Act of 1916 collectively referred to as the Brown-Stephens Acts. These Acts authorized the

appraisal and assessment of Indian lands and provided that any taxes delinquent for one year could be certified to the Secretary of Interior as unpaid. Upon Certification the delinquent taxes were to be paid from any funds of the allottee arising from rentals in control of the Secretary at or after the time of certification. The trust lands were not subject to levy and sale and in the absence of the described funds, certification of same by the Secretary to the County discharged the tax liability.

The Petitioner, the County of Thurston, State of Nebraska, is a small county located along the Missouri River in northeastern Nebraska. It has 7,000 residents; 2,350 of whom approximately 33.5% of whom are Indians. Its land area is 240,000 acres, of which 25% is held by Indian allottees or tribes. 34,000 acres of this land is under Indian trust patents under the General Allotment Act or nearly identical allotment statutes and was assessed in 1973 at a value of $1,489,170.00. Taxes from the Indian trust patents annually provided 10% of the budget of Thurston County. The land base for taxation by Thurston County was at time of suit being eroded by tribal acquisition of previously taxable lands, which acquisition in 1973 amounted to 2,198 acres of land, resulting in a valuation of $96,855.00 being removed from the tax rolls. All Indian lands in Thurston County were legally and fairly assessed below the level of comparable lands held by non-Indians.

Many services are furnished to Omaha and Winnebago Indians in Thurston County by Thurston County. These include fire protection, ambulance service, rescue service, road maintenance, courts, and civil legal action

enforcement and services. The Criminal law enforcement for both tribes off the reservation and for the Winnebago tribe on and off the reservation is furnished by the County. In 1973, 87% of the welfare recipients were Indians, 64.65% of the County institutional care costs of 1973 and 81.75% in 1974 were for Indians. In 1972, 745 out of 1,152 criminal cases involved Indians. In 1973/74, 401 out of 410 students in Macy schools were Indians; 263 out of 356 in Winnebago schools were Indians, and 53 of 397 in Pender schools were Indians.

As only leased trust patent land were taxed by Thurston County, the leases themselves in most cases dealt with the means of payment of the tax. Most, if not all, provided for the payment of taxes by the lessee in addition to the rents to the Bureau of Indian Affairs and this provision or other instructions of the allottees for the payment of taxes were noted on the agency real estate card covering the allotment and lease. The total rent and tax monies received by the agency were segregated respectively into the Individual Indian Money Account and Special Deposit Accounts for payment of taxes to Thurston County.

Since the inception of the taxation under the Brown-Stephens Acts, and for a period of half a century, administratively the taxes were paid. In 1972 through request of the Winnebago and Omaha Indian Tribes, the Agency discontinued permanently the use of Special Deposit Accounts for the payment of Thurston County real estate taxes and the funds were transferred out of the existing Special Deposit Accounts to the Individual Indian Money Accounts, and thereafter, at the request of the Allottees

through their Tribes, paid out to the Allottees. Despite this transfer, on all dates of certification of delinquent taxes for the years 1965 through 1972, by the County Treasurer to the Secretary of Interior, there were sums of various amounts, existing in the Special Deposit Accounts and identified as tax monies thereby.

Prior to 1970, real estate taxes in Nebraska became due and payable on January 1 of the following year; for example, real estate taxes for 1966 became due and payable on January 1, 1967. For the year 1971 and succeeding years, taxes became due and payable on the last day of the year; for example, 1972 taxes were due and payable December 31, 1972.

The 1965-68 taxes were certified by the Secretary of Interior on May 30, 1972; 1969-70 taxes on March 10, 1972; 1971 taxes on January 19, 1973; 1972 taxes on January 8, 1974. The Secretary of Interior or his agent certified pursuant to the Brown-Stephens Act, as follows: 1965-1970—no certification; 1971—certification by William Rogers, Deputy Assistant Secretary of Interior on March 20, 1973: no funds in his possession or under his control available for payment of those taxes; 1972—Secretary of Interior, Rogers Morton certified March 4, 1974: no funds in his possession or under his control available for payment of taxes. On all dates of certification the Special Deposit Accounts for Thurston County taxes had allottee funds in them. Specifically, the taxes certified as delinquent for 1965 through 1972 are as follows: 1965—$6,392.00, 1966—$11,043.88, 1967—$14,438.88, 1968—$17,-694.63, 1969—$28,027.98, 1970—$84,316.02, 1971—$95,-511.78, 1972—$102,177.37, total $359,598.15.

The table below sets forth the amounts in special deposit accounts on the dates of certification of the above taxes by the County of Thurston:

Date Certification Sent to Secretary of Interior	Years for Which Taxes Due	Total Amount of Overdue Taxes	Amount in S. D. Accounts on Date of Certification	
May 30, 1972	1965-68	$ 49,565.39	1965 -	$ .29
			1966 -	55.11
			1967 -	887.66
			1968 -	853.10
			1969 -	1,535.34
			1970 -	10,886.28
			1971 -	3,812.56
			TOTAL	18,030.34
March 10, 1972	1969-70	112,344.00	1969 -	9,388.09
			1970 -	67,098.35
			1971 -	39,772.31
			Other Years -	4,344.59
			TOTAL	120,603.34
January 19, 1973	1971	95,511.78	1971 -	1,208.77
			Other Years -	4,298.34
			TOTAL	5,507.11
January 8, 1974	1972	102,177.37	1965 -	
			1971 -	165.96

Rulings Below. The District Court found that the Indian allottees had a vested right to hold the trust lands as tax exempt property until termination of the trust and that the allottees must consent to the taxation despite the Brown-Stephens Act. It held that prior to 1972, the allottees consented to the taxation by providing for payment of the real property taxes by the lessee in leases of their land, and that the Secretary had a mandatory duty, enforceable through mandamus, to pay the overdue taxes. The District Court further held that taxes for the years 1968 and prior were barred by the Statute of Limitations and that taxes for the year 1972 and later were barred by the allottees revocation of consent during that year. The District Court issued a Writ of Mandamus, requiring payment of taxes from the Indians present or future funds in the hands of the Secretary of Interior for taxes consented to and due for the years 1969, 1970 and 1971.

The Court of Appeals agreed with the District Court that the allottees had a vested right to hold trust lands as tax exempt property during the period of the trust that consent of allottees was required and had been given, but that consent was withdrawn in March 1972 and since the tax monies for the years 1969, 1970 and 1971 had been paid out by the Secretary of Interior, even though wrongfully, that mandamus would not lie to force the payment from those funds accumulated thereafter, from which the allottees had not consented to pay taxes for prior years. As this disposed of the case, the Circuit Court did not consider the question of whether or not the Statute of Limitations had been properly selected and applied by the District Court.

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REASONS FOR GRANTING THE WRIT

1. The multiplicity of Indian tribes, reservations and trust areas and the economic impact on the remainder of the community require that comprehensive statutes such as the General Allotment Act not be interpreted identically as to all tribes and allottees but interpreted with peculiarity as to the individual tribe, its allotments and the community affected.

There are 289 federally recognized Indian tribes in the United States. There are 262 federally recognized reservations in addition to 219 native Alaskan villages and reservations and 542,897 Indians are presently serviced by the Bureau of Indian Affairs of the Department of the Interior.[1] With such a large number of Native Americans woven into the fabric of the country the statutes dealing with those Indians, their trust patent lands, and the rights of the individual States and their political subdivisions to tax them, should not be subjected to generalizations as the individual treaties, economic and political situations vary from tribe to tribe and from reservation to reservation. This fact has been recognized more and more by this Court in recent years. See *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973); *McClanahan v. Arizona Tax Commission,* 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973).

In its opinion, the Circuit Court relied strongly on *Choate v. Trapp,* 224 U. S. 665, 32 S. Ct. 565 (1912) which held that the Choctaw and Chickasaw allottees received a

1 Report of the American Indian Policy Review Commission: Tentative Draft April 23, 1977.

vested property right of non-taxability in their trust lands allotted to them as part of their consideration for accepting said lands. Numerous cases following *Choate* were recited by the Circuit Court, but few did more than rely upon the law of the case and ignored the underlying facts requiring contractual consideration for a vested property right of tax exemption to arise. While the Circuit Court did seek to find consideration and claimed to have done so in the surrendering by the allottees of their equitable right to occupy tribal lands, it ignored the fact that in the case of the Omahas and the Winnebagos, the General Allotment Act and the other allotment acts of the Omahas all failed to provide for non-taxation of the trust that it be transferred to the allottee "free of all charge or encumbrance whatsoever". The peculiar status of the Omaha and Winnebago allottees was also ignored by the Court for all of the treaties dealing with the tribal lands which were allotted as trust patent lands taxed by Thurston County, provided that the Congress of the United States should have the right to alter the freedom of those lands from levy or sale, thereby making them taxable.[2]

Should the Court let stand the opinion of the 8th Circuit in this case, again misapplying *Choate v. Trapp,* as have so many others, it will compound the problems in the future in dealing with allotments on all the many reservations and among the members of the many tribes of Amer-

2 Treaty with the Winnebago Indians of March 8, 1865, 14 Stat. 671; Treaty with the Omaha Indians of March 6, 1865, 14 Stat. 667; Treaty with the Winnebago Indians of April 15, 1859, 12 Stat. 1101; Treaty with the Winnebago Indians of February 27, 1855, 10 Stat. 1172; Treaty with the Omaha Indians of March 16, 1854, 10 Stat. 1043; Treaty with the Winnebago Indians of October 13, 1846, 9 Stat. 878.

ican Indians and will further complicate the relationship of those allottees to the political subdivision in and alongside which they reside or hold trust patents.

2. This is a case of first impression in which a statute appears providing specific Congressional authorization of taxation of trust patent allotments under the General Allotment Act and similar allotment statutes and yet providing for the preservation of the trust pledge to transfer the land "free of all charge or encumbrance whatsoever" at the end of the trust period.

While many cases have dealt with the right to tax various facets of trust patent land created by the General Allotment Act and similar statutes, none have dealt with a statute in which Congress specifically authorized taxation of such trust patent allotments and provided a means of preserving the duty of the United States to transfer those lands at the end of the trust period free from all charge and encumbrance. This Court has long taken the position that Congress could, by specific authorization, alter the tax status of the American Indian and his property, tribal and private; but has always taken the position that such authorization must be specific. *Squire v. Capoeman,* 351 U. S. 1, 76 S. Ct. 611 (1956), *McClanahan v. Arizona Tax Commission,* 411 U. S. 164, 36 L. Ed. 2nd 129, 93 S. Ct. 1257 (1973), *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 36 L. Ed. 2nd 114, 93 S. Ct. 1267 (1973). It is vital in an age when American Indians are laying claim to vast tracts of land within the various states, that the right of Congress to provide specifically for taxation of Indians and Indian lands be carefully considered and receive a full review of this Court before being enunciated. Any restriction on the right of Congress to provide for State taxation of Indians erodes the plenary powers of Congress over the American Indian and leaves no recourse to the State and its political subdivisions in dealing with the economic problems created by the existence of trust allotments within the area for which services are provided and from which they are funded.

3. As stated by the Circuit Court on the final page of its opinion, this case is an important case not only to the Petitioner but to the Respondent, and as such, it should be reviewed fully by this Court by granting a Writ of Certiorari.

The amount of tax revenue lost to a small rural county such as Thurston, i. e., nearly $100,000.00 a year, which, based on 1972 levies and values is an amount equal to 10% of its budget, should not be lightly regarded. The removal of this tax revenue from Thurston County coffers after being specifically authorized for collection by Congress should have every judicial review possible. The same is also true for problems caused the allottees. The extension of the trust period from its proposed termination in 1912, first by executive orders and later by statute[3] has created a problem of fractionalization of interests rendering many allotments all but worthless. As evident from the accounting filed jointly in the District Court, which is part of the record, the inalienability of the trust patents have resulted in their transferance by inheri' nce to the point where the original allotments of 40 acres have become so fractionalized that they are, for the most part a source of negligible income to the allottees. In many cases, they are of

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3 See 25 U. S. C. 461, 462.

such small amounts as to be completely useless to the allottees if and when distributed. Under such fractionalization the major benefit that the allottees could obtain from their interest in them would be to utilize the portion of the rental income of such fractionalized allotments to pay taxes which collectively could and do benefit the allottees through services provided by Thurston County.

In conjunction with the importance of the case to Thurston County, attention should be given by the Court to the fact that the disbursal of tax monies from the Special Deposit Accounts up for the years 1969, 1970 and 1971, for taxes (which years the Indian allottees, in any event, had consented to payment of taxes) were in fact made by the Secretary of Interior wrongfully at the request of those very allottees, who had consented to their collection for payment of taxes to Thurston County. Such a request equitably should transfer the allottees consent for payment of tax from rents for those years to payment from rents later received by the Secretary of Interior thus enabling a writ of mandamus to lie, in any case, for the payment of taxes for the years 1969, 1970 and 1971. Finally, should the Court grant the Writ of Certiorari and agree with the County that the specific authorization by Congress to tax found in the Brown-Stevens Act, does not require the consent of the Indian allottee to the tax, the application of the proper Statute of Limitations, the fifteen year statute of the State of Nebraska for the collection of real estate taxes[4] should be applied rather than the three year statute applied by the District Court, thus providing a workable time frame to resolve collections.

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4 Sec. 77-1862 (2) R. R. S. Neb. 1943.

CONCLUSION

For the reasons above stated:

1. That this case involves a question of general importance to the states and their political subdivisions throughout the nation wherever the 289 tribes and their over half million members reside, possess and rent trust patent lands.

2. That this is a case of first impression involving a statute in which Congress specifically authorizes taxation of trust patent lands while still insuring that the trust promise of transferring those lands at the end of a trust period, free of all charges and encumbrances is protected.

3. That it is a case of great importance not only to the Petitioner herein, Thurston County, because of the loss of a great amount of tax revenue which can be ill afforded, but as well to like-situated State political subdivisions facing increased rising land claims by Native Americans. At the same time it is of great importance to the Indian allottee himself because, through payment of taxes from rents received from trust allotments, useless fractionalized income can be joined to enable the taxing body to provide collectively through tax funds additional services to the allottees which they would otherwise not receive; and for all of these reasons the Writ of Certiorari prayed for should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-173

COUNTY OF THURSTON, State of Nebraska,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary of the Interior, United States of America, et al.,

Defendants.

MEMORANDUM OPINION

(Filed January 7, 1976)

This is an action brought under the Brown-Stephens Act (Act of December 30, 1916, 39 Stat. 865) in which plaintiff, Thurston County, Nebraska [Thurston County], seeks a writ of mandamus requiring the Secretary of the Interior [Secretary] to disburse funds presently under his control as payment for past due taxes and an order requiring the Secretary to hold funds which come under his control in the future and to disburse those funds in payment for past due taxes. The Omaha and Winnebago Tribes, representing their respective members, were allowed to intervene as defendants. Thurston County has assessed taxes on trust patent lands which were allotted to individual Indians and their descendents and which are held by the United States in trust for the allottees.[1]

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1 Trust patent lands are those lands which were allotted by the United States to individual Indians but which were

(Continued on next page)

Thurston County claims that under the Brown-Stephens Act it may assess taxes on these lands and collect those taxes from funds obtained from the rental of the lands.

The Brown-Stephens Act provides as follows:

> Section 1.—That all of the lands in the State of Nebraska belonging to the members of the tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five-year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska, now in force or to be hereafter enacted.
>
> Section 2.—That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now

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held in trust by the government for use and benefit of the Indian allottees. Therefore, a trust patent is not really a patent at all because it does not convey a fee interest. It is merely a written declaration that the United States holds the legal title in trust for the allottee and that it will issue a patent conveying fee title at the expiration of the trust period. *See United States v. Rickert,* 188 U. S. 432, 436 (1903).

> in force or to be hereafter enacted: *Provided,* That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska for the collection of such taxes; but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds.

Jurisdiction is present under 28 U. S. C. § 1331 and 28 U. S. C. § 1361.

FINDINGS OF FACT

This matter was tried to the Court without a jury and the Court makes the following findings:

(1) Thurston County, Nebraska, is a political subdivision of the State of Nebraska and a valid taxing authority under the laws of that state.

(2) The land in question amounts to approximately thirty-four thousand acres of trust patent lands within Thurston County's boundaries. This land was allotted to

individual members of the Winnebago and Omaha Tribes and their descendants, and the United States presently holds the patents in trust for the allottees. Thurston County is attempting to tax only those trust patent lands that are leased to non-allottees. In other words, it does not claim taxes on land owned by the tribes, Leaming allotments (non-alienable land allotted to heads of families), or trust patent lands that are not leased.

(3) The Aberdeen Area Office of the Bureau of Indian Affairs has the overall responsibility for administering the lands and collecting, accounting for and disbursing funds to the allottees. Many of the trust patent lands are leased to non-allottees, and the Winnebago Agency, which is subordinate to the Aberdeen Area Office, approves the leases of these lands, collects the money due under the leases and disburses the funds to the Indians. Many, if not all, leases prior to 1972 provided that the lessee would pay as rent either a fixed sum of money or a share of the crops, plus state and local taxes. In most cases the lessee paid the total rent to the personnel at the Winnebago Agency for distribution to the allottees and for payment of taxes to Thurston County.

(4) Prior to 1972 the money received by the Winnebago Agency was credited to two types of accounts: Special Deposit [S. D.] accounts and Individual Indian money [I. I. M.] accounts.[2] Money received for the payment of real estate taxes was credited to the S. D. accounts for that year and was disbursed to Thurston County. S. D. accounts were established for the years

2 I. I. M. accounts are provided for and regulated in 25 C. F. R. § 104, *et seq.*

1965 through 1971. The remaining rental money was credited to the I. I. M. accounts, which were individual accounts in the name of each allottee, and the money was disbursed to the allottees upon request.

(5) In 1972, at the request of the Omaha and Winnebago Tribes, the Agency permanently discontinued the use of S. D. accounts for the payment of Thurston County real estate taxes. No S. D. accounts were established for taxes for 1972 or subsequent years. During 1972 the agency began transferring money from the S. D. accounts to the I. I. M. accounts and disbursing those funds to the individual allottees. Some money remained in the S. D. accounts, presumably because the allottees could not be identified or located. An example of these disbursements is shown by the fact that on March 10, 1972, the combined balance in the S. D. accounts for 1965-71 was $120,603.34; on January 19, 1973, the combined balance was $5,507.11; on January 9, 1974, the combined balance was $165.96.

(6) Prior to 1970, real estate taxes became due and payable on January 1 of the following year. *See* Neb. Rev. Stat. § 77-203 (Reissue 1966). For example, real estate taxes for 1966 became due and payable on January 1, 1967. For the year 1971 and succeeding years the taxes became due and payable on the last day of the year. Neb. Rev. Stat. § 77-203 (Reissue 1971). For example, 1972 taxes were due and payable on December 31, 1972.

(7) The Thurston County Treasurer certified to the Secretary of the Interior that taxes on trust patent lands were overdue. The following table contains the date the County Treasurer certified overdue real estate taxes to

the Secretary of the Interior, the amount of real estate taxes which were due, and the balance in the S. D. accounts on the date when the certification was sent.

Date Certification Sent to Secretary of Interior	Years for Which Taxes Due	Total Amount of Overdue Taxes	Amount in S. D. Accounts on Date of Certification	
May 30, 1972	1965-68	$ 49,565.39	1965 -	$ .29
			1966 -	55.11
			1967 -	887.66
			1968 -	853.10
			1969 -	1,535.34
			1970 -	10,886.28
			1971 -	3,812.56
			TOTAL	18,030.34
March 10, 1972	1969-70	112,344.00	1969 -	9,388.09
			1970 -	67,098.35
			1971 -	39,772.31
			Other Years -	4,344.59
			TOTAL	120,603.34
January 19, 1973	1971	95,511.78	1971 -	1,208.77
			Other Years -	4,298.34
			TOTAL	5,507.11
January 8, 1974	1972	102,177.37	1965 -	
			1971 -	165.96

(8) With respect to taxes for the years 1965-70, the Secretary of the Interior, or his agent, did not certify that there were no funds available for the payment of taxes.

(9) With respect to 1971 taxes, William Rogers, Deputy Assistant Secretary of the Interior, certified on March 20, 1973, that there were no funds in his possession or under his control available for the payment of those taxes. On that date the S. D. accounts for 1965-71 had a combined balance of $3,831.89, of which $0.88 was credited to the S. D. account for 1971.

(10) With respect to the 1972 taxes, Secretary of the Interior Rogers Morton certified on March 4, 1974, that he had no funds in his possession or under his control available for payment of the taxes. On that date the S. D. accounts for 1965-71 had a combined balance of $165.96, none of which was identified as 1972 taxes.

(11) At the time of trial overdue taxes for 1973 had not been certified to the Secretary of Interior. The following are the past due taxes, broken down by years, which have been certified to the Secretary of the Interior by the Thurston County Treasurer.

1965	$ 6,392.00
1966	11,043.88
1967	14,438.88
1968	17,694.63
1969	28,027.98
1970	84,316.02
1971	95,511.78
1972	102,177.37
TOTAL	$359,598.15

(12) Tax funds obtained from the real estate taxes on the trust patent lands were expended by Thurston County in the entire field of government services, including health, welfare, roads, education, law enforcement,

etc. Further facts will appear in the body of this opinion.

CONCLUSIONS OF LAW

At issue here is Thurston County's taxation of the trust patent lands which are leased to non-allottees. In most cases where trust patent lands were leased to non-allottees, the lessees agreed to pay state and local taxes as part of the rent, and such rent was usually a fixed amount of cash plus taxes or a share of the crops plus taxes. The tax liability fell upon the allottees and the lessees' obligation to pay taxes arose from the lease agreement. Thus, this is not a case involving a use tax on the lessees' interest in the property. *Compare Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342 (1949); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971), *cert. denied*, 405 U. S. 933 (1972).

The first issue to be decided is whether the state or a political subdivision thereof may validly tax these trust patent lands without the consent of the allottees. For the reasons which follow, the Court finds that the trust patent lands in question are exempt from state and local taxation in the absence of the allottee's consent. There is no evidence that the allottees were expressly promised at the time of the allotment that the lands would be tax exempt, as was the case in *Choate v. Trapp*, 224 U. S. 665 (1912), and *Morrow v. United States*, 243 F. 854 (8th Cir. 1917). However, the lands in question were allotted under the General Allotment Act, 25 U. S. C. § 331, *et seq.*, which contained the following language:

> [A]t the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever.
>
> (25 U. S. C. § 348).
>
> • • •
>
> That the Secretary of the Interior may in his discretion, and he is authorized • • • to cause to be issued to such allottee, a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted to pay the issuing of such patents.
>
> (25 U. S. C. § 349).

Implied tax exemptions, whether they are for Indians or others, are not favored. *See, e. g., Mescalero Appache Tribe v. Jones*, 411 U. S. 145, 156 (1973); *Omaha Tribe of Indians v. Peters*, 516 F. 2d 133 (8th Cir. 1975). Nevertheless the statutory language must be construed in light of the following principle:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection in good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenure of the treaty, they should be considered as used only in the latter sense." (Citations omitted).
>
> *Squire v. Capoeman*, 351 U. S. 1, 6-7 (1956). *See also Antoine v. Washington*, 420 U. S. 194, 199-200 (1975).

It has been held that the above-quoted language of the General Allotment Act, when construed in favor of the

Indians, created a vested right in the allottees and their descendants to hold the trust patent land exempt from state or local taxes during the duration of the trust period. *See, e. g., Kirkwood v. Arenas,* 243 F. 2d 863 (9th Cir. 1957); *Glacier County, Montana v. United States,* 99 F. 2d 733, 734 (9th Cir. 1938); *United States v. Nez Perce County, Idaho,* 95 F. 2d 232, 235 (9th Cir. 1938); *Board of Commissioners of Caddo County, Oklahoma v. United States,* 87 F. 2d 55 (10th Cir. 1936); *Morrow v. United States,* 243 F. 854 (8th Cir. 1917); *United States v. Spaeth,* 24 F. Supp. 465 (D. Minn. 1938). *See generally Federal Indian Law,* 855-59 (Dept. of Interior 1958). *See also Mahnomen County v. United States,* 131 F. 2d 936, 938 (8th Cir. 1942), *reversed on other grounds,* 319 U. S. 474 (1943). The United States Supreme Court has not expressly decided whether the General Allotment Act created a vested right to a tax exemption, but the case of *Squire v. Capoeman, supra,* lends support to the position that the Act did create a tax exemption. The Court examined the above-quoted language of the Act and found that it

> [E]vinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free of all taxes, both those in being and those which might in the future be enacted.
>
> 351 U. S. at 8.

See also Mahnomen County v. United States, 319 U. S. 474, 476-77 (1943). Although the "free of all charge or encumbrance" language of the Act was primarily designed to restrict the power of alienation, *Bird Bear v.*

McLean County, 513 F. 2d 190, 193 n. 10 (8th Cir. 1975), the language regarding the restrictions on taxation (25 U. S. C. § 349) indicates to this Court that there was such a tax exemption.

In light of the above authority, the Court finds that the General Allotment Act created a right to hold the trust patent lands as tax exempt property during the period of the trust and that this right was not inconsistent with overall Indian policy. The allottees may not be deprived of this right by the Brown-Stephens Act or any other legislative action without compensation. *Choate v. Trapp, supra,* 224 U. S. at 673-75. Thus, this Court must construe the Brown-Stephens Act in such a way that it does not conflict with the Constitution. The only such interpretation is that the Brown-Stephens Act does not take away the allottee's vested right to tax-exempt land, but merely provides for a method of assessing and collecting taxes on the property in question, with an implied right in the allottees to consent or object to the assessment. This is the interpretation suggested in *Allbaugh v. United States,* 184 F. 2d 109, 115 (8th Cir.), *cert denied,* 340 U. S. 905 (1950).

The next issue is whether the allottees consented to taxation by Thurston County. An Indian allottee may validly consent to state taxation and that consent is effective to make him liable for the payment of those taxes. *Mahnomen County v. United States,* 319 U. S. 474 (1943). The evidence here is that most, if not all, leases to non-allottees provided that the lessee would pay state and local taxes as part of the rent. The Eighth Circuit held that such a provision in a lease amounts to the allottee's consent to payment of taxes from the rental payments.

> The provision made by the allottee in the lease that the lessee should pay the taxes manifestly constituted a consent to their payment from that source at least, in so far as the allottee would be capable of giving the consent.
>
> *Allbaugh v. United States, supra,* 184 F. 2d at 115.

The fact that the lessees paid that part of the rent designated as taxes to the B. I. A. for payment to Thurston County rather than directly paying Thurston County, as was the case in *Allbaugh,* is immaterial.

In 1972 the B. I. A. surveyed the allottees to determine if they consented to the taxation by Thurston County. Silence by the allottee was construed to mean that there was no such consent. Approximately sixty allottees responded that they did consent, which number was lowered to about forty after some allottees amended their initial responses. In the absence of any evidence to the contrary, the Court finds that silence to the B. I. A.'s survey was effective as a revocation of consent.

In sum, those allottees who provided for payment of taxes by the lessees consented to the imposition of taxes and are liable for those taxes which became due and payable prior to the date that the consent was revoked, which for the majority of allottees was April, 1972—the date of the B. I. A. survey.

Since many of the allottees were liable for taxes through and including 1971, the next question deals with the duties and responsibilities of the Secretary of Interior under the Brown-Stephens Act. The Act provides that if the county taxes were not paid within one year after they became due and payable, the county treasurer

should certify that fact to the Secretary of the Interior, "who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control." The defendants argue that the language of the Act, which is not mandatory, gives the Secretary *discretion* to pay taxes, but that he is not *required* to do so. However, the use of the word "authorized" does not necessarily make performance discretionary; that word may impose a mandatory duty to act. *See, e. g., United States Sugar Equalization Board v. United States,* 7 F. 2d 981, 985-87 (3d Cir. 1925); *Chase v. United States,* 261 F. 833, 837 (8th Cir. 1919), *aff'd,* 256 U. S. 1 (1920); 73 *Am. Jur.* 2d *Statutes,* § 24. The legislative history of this statute is helpful in determining whether Congress intended to impose a mandatory duty on the Secretary or leave the matter to his discretion. The legislative history of the Act and its predecessor, the Brown Act (Act of May 6, 1910, 36 Stat. 348), shows that Thurston County was in serious financial trouble at the time of the Act. About ninety per cent of the county consisted of Indian lands, which were exempt from taxation. At the same time, the county had a large amount of expenses which were incurred for the benefit of all county residents of both the Indian and white races. It had originally been planned that the patents would be held in trust by the United States for twenty-five years from the date of the allotment and after that time the land would be patented in fee to the individual Indians. Once the land was patented in fee it would have been subject to state and local real estate taxes and the addition of this land to the tax rolls would have provided sorely needed financial relief to the

county. However, the initial twenty-five-year trust periods were extended, which postponed the taxation of Indian lands. The Brown-Stephens Act was passed to provide Thurston County with the necessary financial relief during the period of the extension of the trust. *See* S. R. No. 397, 61st Cong., 2d Sess. (March 14, 1910); H. R. No. 994, 64th Cong., 1st Sess. (July 18, 1916); H. R. No. 1098, 64th Cong., 1st Sess. (August 8, 1916). In searching the legislative history the Court has found no language to indicate that Congress intended to allow the Secretary to exercise his discretion in deciding whether to pay taxes. To the contrary, language from a house debate indicates an opposite intent:

> Mr. Fitzgerald: Mr. Speaker, the gentleman does not understand my inquiry. I inquired whether these taxes should not be paid first from the lands that are leased.
>
> Mr. Burke of South Dakota: The intention, as I understand it, is that if these allottees fail to pay the taxes that may be levied on these lands, *the list will be certified to the Department of Interior and paid from any funds that may be due to the individual allottee owning the land. Consequently, if there is any rental money, it will be used to pay the taxes.* (Emphasis added.)
>
> 45 Cong. Rec. 5449, 5450 (April 27, 1910), 61st Cong., 2d Sess.

A reasonable inference from this language and other legislative history is that Congress intended payment to be made automatically upon certification of overdue taxes by the county treasurer. The Act imposed a statutory duty upon the Secretary to pay overdue taxes for which

the individual allottees were liable and the Secretary was not given discretion to disburse the funds.

The next issue deals with the effect of the Secretary's actions in certifying that there were no funds available for the payment of taxes and in distributing the money after the county treasurer's certification had been sent and received by the Secretary. Under the Act, a certification by the Secretary that no funds were available discharged the tax liability of the individual allottees, but such a certification could be made only "in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior." As the Court has already found, the Secretary had funds under his control at the time the county treasurer certified the past due taxes and, therefore, the Secretary's certifications did not discharge the tax liability.[3] To allow the Secretary's certifications, made contrary to the statute, to operate as a discharge of the tax liability, would violate the spirit and intent of the Brown-Stephens Act.

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3 On March 10, 1972, the date on which 1969-70 taxes were certified to the Secretary of the Interior, the S. D. accounts had a combined balance of $120,603.34. On May 30, 1972, the date on which the 1965-68 taxes were certified to the Secretary, the S. D. accounts had a combined balance of $18,030.34. On January 19, 1973, the date on which the 1971 taxes were certified to the Secretary, the S. D. accounts had a combined balance of $5,507.11. On March 20, 1973, the date on which the Deputy Assistant Secretary of Interior certified that there were no funds available for the payment of 1971 taxes, the S. D. accounts had a combined balance of $3,831.89. On January 9, 1974, the date on which the 1972 taxes were certified to the Secretary, the S. D. accounts had a combined balance of $165.96. That amount was also the combined balance of the S. D. accounts on March 4, 1974, the date on which the Secretary certified that no funds were available for the payment of taxes. See *Finding of Fact No. 7.*

The Secretary of the Interior failed to recognize and obey his statutory duty when he did not disburse funds upon receipt of the county treasurer's certification. The proper procedure which should have been followed was that the Secretary should have determined the tax liability of each piece of property and then determined each owner-allottee's pro rata share of that liability. Next, he should have determined whether there were sufficient funds credited to the accounts of the respective allottees to pay the tax liability for his or her land. If there were sufficient funds those funds should have been disbursed to Thurston County in payment for the overdue taxes. If there were no funds or if the funds disbursed were not sufficient to satisfy the allottee's liability, then the Secretary should have issued a certificate and that certificate would have operated as a complete discharge of the unpaid balance.

RELIEF GRANTED

With respect to those allottees who consented to the payment of taxes, the Secretary should have used funds credited to the accounts of those allottees to satisfy their individual tax liabilities. Since the Act did not give the Secretary discretion to withhold money from Thurston County, his refusal to disburse the funds to the County was outside the scope of his authority and power. Mandamus is an appropriate remedy for such an abuse of power. *State Highway Commission of Missouri v. Volpe,* 479 F. 2d 1099, 1104-05 n. 6 (8th Cir. 1973). *See also Miller v. Ackerman,* 488 F. 2d 920, 921-22 (8th Cir. 1973). Therefore, the Court will order an accounting to determine each allottee's liability for overdue taxes and the

amount credited to his account which is available for the payment of taxes and which is presently under the control of the Secretary. A writ of mandamus will then be issued directing the Secretary to pay those funds to Thurston County. If there is enough money in an allottee's account to pay his tax liability, the allottee's obligation shall be discharged.

If there is not enough money to completely satisfy the tax obligation, the Court must fashion a remedy which, on one hand, will give Thurston County the money to which it is legally entitled and, on the other hand, which will be fair to the Indian allottees. Thurston County does not ask that the amount remaining unpaid, if any, be paid out of the general funds of the United States and, indeed, such relief would be improper because it would place the ultimate burden for the local taxes on the United States instead of individual allottees. Such relief would violate the language and intent of the Brown-Stephens Act which provides that the money be paid from money "belonging to the Indian allottees owning such lands." Furthermore, the legislative history of the Act shows that Congress thought the Indians would be benefited in the long run if they assumed the financial responsibilities of citizenship. *See, e. g.,* S. R. No. 397, 61st Cong., 2d Sess. March 14, 1910. Thus, it is clear that the state and local tax burden must be placed on the individual allottees and not on the United States.

The allottees, having consented to taxation, must be responsible for the payment of the unpaid balance. If sufficient funds are not presently available to pay that amount, Thurston County is entitled to have the amount due withheld from future rental payments made to the

allottees. The allottees received a windfall when the Secretary improperly distributed money which had been set aside for the payment of the taxes, and now the allottees must respond in repayment. The Court notes, however, that the withholding of *all* future rental payments may lead to unnecessarily harsh results because it might operate to deprive some allottees of all income until the overdue taxes have been paid, a result which would not be in the best interests of either the allottees or Thurston County. At this time there is no evidence upon which the Court can determine whether all or only a portion of the future rent payments should be withheld until this obligation is satisfied. If within thirty (30) days of the date of this opinion the parties are unable to agree upon a figure which should be withheld, which agreement will in no way prejudice their respective rights, the Court will hold a hearing at a later date to determine the proper portion to be withheld.

Defendants argue that Thurston County's claim is not timely insofar as it seeks recovery of overdue taxes. Such a claim is legal in nature and controlled by the statute of limitations rather than the doctrine of laches. *See Gruca v. United States Steel Corp.*, 495 F. 2d 1252, 1257 (5th Cir. 1974). Since there is no federal statute of limitations for actions brought under the Brown-Stephens Act, the Court has looked to the Nebraska state statute of limitations which is the most closely analogous to this action. *See, e. g., Lamb v. United Security Life Co.*, 59 F. R. D. 44, 46 (S. D. Ia. 1973). The state statute which is most analogous to this action is Neb. Rev. Stat. § 25-219 (Reissue 1964), which provides a three-year period for actions upon a liability created by a federal statute

and for which no period of limitations was established.[4] The right of action against the Secretary for overdue taxes of allottees was created by the Brown-Stephens Act, and it is upon this right which Thurston County bases its claim. This action was filed March 23, 1973, and therefore, any claim which arose prior to March 23, 1970, is barred by the statute of limitations.

Under the Brown-Stephens Act, the Secretary is not required to disburse funds until a certificate of overdue taxes has been issued by the county treasurer, but the county treasurer's certificate may not be issued until the taxes have been overdue for one year. Thus, Thurston County has no rights against the Secretary and may not compel him to act until at least one year after the taxes have become due and payable under state law. The Court, therefore, finds that the claim under the Brown-Stephens Act did not arise until the county treasurer was able to certify overdue taxes to the Secretary. For example, taxes for the year 1968 (which under Nebraska law became due and payable on January 1, 1969) could not be certified and Thurston County's claim against the Secretary did not arise until January 1, 1970. Under Section 25-219, *supra*, Thurston County had three years from that date within which to file suit, and since the action was not filed until March 23, 1973, the claims for taxes for 1968 and the preceding years are barred.

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4 Neb. Rev. Stat. § 25-219 (Reissue 1964) provides:

> All actions upon a liability created by a federal statute other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute, shall be commenced within three years next after the cause of action shall have accrued.

To summarize the Court's holding, the individual Indian allottees who consented to taxation by Thurston County are required to pay taxes on the trust patent lands for the years that the allottees consented to taxation which, in most cases, were 1969, 1970 and 1971. The Secretary acted outside the scope of his authority when he refused to disburse funds in response to a proper certification by the Thurston County treasurer. An accounting will, therefore, be ordered to determine each allottee's individual tax liability and the amount of funds belonging to the allottee presently under the control of the Secretary which is available for the payment of taxes. A writ of mandamus will issue directing the Secretary to disburse those funds to Thurston County. If that disbursement does not satisfy the allottee's overdue tax liability, the Court will order that all or part of future rent payments (the exact amount to be determined at a later date) be withheld from the allottees until his or her tax liability is satisfied. A separate order will not be entered in conformity with this opinion until such time as a determination has been made with reference to the proper portion of the respective amounts to be withheld.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-173

COUNTY OF THURSTON, STATE OF NEBRASKA,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary of the Interior, United States of America, et al.,

Defendants,

and

THE OMAHA TRIBE OF INDIANS and THE WINNEBAGO TRIBE OF INDIANS,

Defendants-Intervenors.

JUDGMENT

(Filed July 7, 1977)

In accordance with the Memorandum Opinion filed herein, January 7, 1967, and the findings of fact and conclusion of law embodied therein:

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Accounting filed herein jointly by the Plaintiff and all Defendants, except Defendants-Intervenors, on May 20, 1977, is approved as being a correct statement of the taxes owed to the County of Thurston, Nebraska, by the allottees of the allotments set forth therein for the years 1969, 1970 & 1971. The Objections of the Defendants-Intervenors, Omaha Tribe of Indians and Winnebago Tribe of Indians to this Accounting are overruled and said Accounting is incorporated herein by reference.

2. Writ of Mandamus shall be issued this date directing the Secretary of Interior of the United States of Amer-

ica, Cecil Andrus, present successor in office to Defendant, Rogers C. B. Morton, to ascertain the allottees of said allotments and to examine the individual Indian accounts of said allottees and such other funds of said allottees which may be under the control of the Secretary of Interior and to pay from those funds the proportionate tax liability of said allottee to the Treasurer of Thurston County, Nebraska. If there are insufficient funds in the account of any of the individual Indian allottees to satisfy said allottee's pro rata share of the tax obligation shown on the Accounting then the balance owed by such allottee, after applying funds of the allottee presently available, shall be paid to Thurston County, from the rentals received by said allottee in the next three years so that any balance due may, at the option of the Secretary of Interior or his disbursing agent, be either paid one-third in each year or the entire balance due from any allottee may be paid at any time. All taxes due from the individual allottees of allotments on the Accounting shall be paid to the Treasurer of Thurston County, Nebraska, by January 1, 1981, or if sufficient funds of the allottee are unavailable in that period, then, at such time thereafter that sufficient funds are available in that allottee's individual money account.

3. Upon payment in full of the individual Indian allottee's proportionate share of the tax liability said allottee's obligation shall be discharged.

DATED in Omaha, Nebraska, this 7th day of July, 1977.

By the Court:

Albert G. Schatz, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 77-1790 and 77-1808

COUNTY OF THURSTON, STATE OF NEBRASKA,

Plaintiff-Appellant,

vs.

CECIL ANDRUS, SECRETARY OF INTERIOR, UNITED STATES OF AMERICA; WYMAN A. BABBY, AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR; AND FLOYD R. THIEMAN, ACTING SUPERINTENDENT, WINNEBAGO AGENCY, BUREAU OF INDIAN AFFAIRS,

Defendant-Appellees,

THE OMAHA TRIBE OF INDIANS AND THE WINNEBAGO TRIBE OF INDIANS,

Intervenor-Appellees and Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Submitted: April 6, 1978

Filed: November 6, 1978

Before LAY and BRIGHT, Circuit Judges, and HANSON, Senior District Judge.*

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*The Honorable William C. Hanson, Senior District Judge for the Southern District of Iowa, sitting by designation.

HANSON, Senior District Judge.

This is an appeal from the judgment of the district court[1] in a mandamus action brought pursuant to 28 U. S. C. § 1361. Jurisdiction in this Court is predicated on 28 U. S. C. § 1291. The case involves the collection of taxes by Thurston County, Nebraska (the County) assessed on certain Indian lands held in trust by the United States under so-called trust patents of allotment for individual allottees of the Omaha and Winnebago tribes. Collection of real property taxes on the land in question is made possible under a special uncodified statute, the Brown-Stephens Act,[2] which permits the County to appraise and assess the

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1 The Honorable Albert J. Schatz, District Judge, District of Nebraska.

2 Act of December 30, 1916, Pub. L. No. 291, 39 Stat. 865. The entire Act reads as follows:

> *Be it enacted* . . . , That all of the lands in the State of Nebraska belonging to the members of the tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska, now in force or to be hereafter enacted.
>
> SEC. 2. That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by

(Continued on next page)

Indian land on which the original trust period has expired and been extended. If local taxes are not paid thereon within a year, the County may certify a list of unpaid taxes to the Secretary of Interior (the Secretary) who is authorized to pay the taxes from funds in his control belonging to the Indian allottee or allottees owning the land and arising from the rent of such land. Under the Brown-Stephens Act, Indian land cannot be levied against by the County and if the Secretary has no funds to pay the taxes, his certification of that fact discharges the tax liability.

Thurston County brought this action against the Secretary and other federal appellees to recover $359,598.15 in

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(Continued from previous page)

> law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: *Provided*, That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska for the collection of such taxes; but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof, or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds.

certified unpaid and delinquent taxes on trust patent lands leased to non-allottees. The taxes were due for the years 1965-1972, inclusive. The County also sought an order compelling future payments of unpaid taxes by the Secretary from rental receipts in the Secretary's control. The district court permitted the Omaha and Winnebago tribes to intervene as defendants.

After trial the district court found that the Indian allottees and their heirs had a "right to hold the trust lands as tax exempt property during the period of the trust," and could not be compelled to pay tax assessed on their land without their consent or compensation. In order to avoid constitutional difficulty, the district court viewed the Brown-Stephens Act as including an implied right to consent or object to payment of the tax assessment. The district court further held that prior to 1972 the allottees consented to taxation by providing for the payment of real property taxes by the lessee in leases of their land, and that the Secretary had a mandatory duty, enforceable through mandamus, to pay the overdue taxes. Accordingly, the district court issued a writ of mandamus requiring payment of the taxes from the Indians' present funds in the hands of the Secretary but only, however, for taxes due for 1969, 1970, and 1971 since the statute of limitations applied by the district court barred recovery for earlier years, and taxes for 1972 were unavailable because of the allottees' revocation of consent. In view of the fact that the Brown-Stephens Act did not limit actions, the district court utilized what it deemed the most analogous state rule, and held that the three-year Nebraska limitations period for liability created by a federal statute governed. *See* Neb. Rev. Stat. § 25-219 (Reissue 1975). The County appeals, chal-

lenging the district court's ruling that the Indians have the right to consent or object to the payment of tax assessments, and the consequent denial of tax money for 1972 and mandamus relief going to subsequent tax years. The County also argues that the district court erred in its choice of the appropriate Nebraska statute of limitations. The intervenors, the Omaha and Winnebago tribes, cross-appeal from the district court's holding that the Secretary had a ministerial duty under the Brown-Stephens Act to pay over allottee funds in his possession upon the County's certification of delinquent taxes the allottees had consented to payment of. The tribes also maintain that the district court's remedy was beyond the scope of the Brown-Stephens Act. The Secretary and other federal defendants do not appeal. Upon review, we affirm the major substantive holdings of the district court, but for reasons explained below, vacate the judgment and remand the cause with directions to deny the mandamus relief sought.

I.

Approximately 34,000 acres of land in Thurston County are held in trust by the United States for the benefit of individual members of the Winnebago and Omaha tribes. The land so held is divided into individual allotments, with designated Indian allottees holding the beneficial interest therein. In many instances, a large number of individuals have come to presently own an interest in a single piece of allotted land through descent and devise from the original allottees. For the purposes of this opinion, an allottee refers to any Indian owning an interest in allotted land.

Much of the trust patent land is leased to renters other than allottees, and it is this land the County seeks to collect taxes on. *See* 25 U. S. C. § 393. The Winnebago Agency, operating under the auspices of the Aberdeen Area Office of the Bureau of Indian Affairs (BIA), approves leases of trust patent land, collects rent due thereunder, and disburses the funds to Indians.

Most leases prior to 1972 provied for a cash rent or a share of the crops, and the payment of state and local taxes by the lessee. Most of the leases at issue here provided for the payment of rental and tax money by the lessee to the Winnebago Agency. The district court viewed these lease provisions as a consent to the imposition of taxes. In the years 1965 through 1971 rental money received by the Agency was credited to either of two types of accounts. Special Deposit (SD) accounts contained money set aside from rentals for the payment of County real estate taxes and was ultimately paid to Thurston County. Rents not directed to the SD accounts were credited to Individual Indian Money (IIM) accounts. IIM accounts were maintained in the name of each allottee or his heirs to whom the rental receipts belonged. *See* 25 C. F. R. Part 104. Subject to some restrictions, adult Indians have the right to withdraw funds held by the Secretary in an IIM account. 25 C. F. R. § 104.3.

In 1971 the Omaha and Winnebago Tribal Councils requested the BIA to stop paying the County taxes on trust patent lands.[3] No payments were made thereafter. In 1972

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3 It appears from the record that the request was made because of dissatisfaction on the part of the Indians with

(Continued on next page)

the Winnebago Agency discontinued the use of SD accounts. No such accounts were established for that year or subsequent years and what funds had previously been in the SD accounts were, beginning in 1972, transferred to the IIM accounts. This action appears to have followed a survey of allottees by the BIA in 1972 to determine whether they wished to consent to County taxation. Silence from an allottee was construed as a lack of consent. Only a handful of allottees consented to taxation. The district court found that affirmative refusal to consent or silence in response to the BIA survey was effective as a revocation of any consent theretofore given. Some money remained in the SD accounts until 1974, though the total amount steadily dwindled as individual allottees were located and their share of the SD funds transferred to their IIM account.

Since 1972 new leases of allotment land have not provided for the payment of County taxes, and there has been no other manifestation of consent to taxation on the allottees' part. Moreover, it appears that no rental income from which the allottees had consented to the payment of taxes remains in the possession of the Secretary.

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the services they were receiving from the County, particularly with regard to road maintenance. There was apparently also a feeling of discontent with the unique situation the Omaha and Winnebago Indians were in where, as Winnebago Tribal Council member LaRose put it, the Bureau of Indian Affairs acted as the "tax collector" for Thurston County.

The County treasurer, pursuant to the Brown-Stephens Act, certified overdue taxes to the Secretary for the years 1965 through 1972 as follows:[4]

Date of Certification by County	Years Taxes Due	Total Overdue Taxes
May 30, 1972	1965-68	$ 49,565.00
March 10, 1972	1969-70	112,344.00
January 19, 1973	1971	95,511.78
January 8, 1974	1972	102,177.37

With respect to overdue taxes for the years 1965-70, the Secretary failed to either pay the taxes or certify the non-availability of funds for payment. On March 20, 1973, the Secretary certified that there were no funds in his possession for the payment of 1971 County taxes, and on March 4, 1974, he similarly certified non-availability of funds for the payment of 1972 taxes. However, the district court found that in fact the Secretary did have rental funds in his possession when the County originally certified overdue taxes. Consequently, the district court held that the Secretary's certifications of non-availability were not effective to discharge the tax liability.

The County filed its complaint in this action after unsuccessful attempts to gain payment of the overdue taxes from the Secretary.

As noted, the district court held first that the allottees could not be compelled to pay a tax assessed against their trust patent land without their consent; second, that the allottees had consented to payment in years prior to 1972 by providing for payment of taxes in leases of allotted land and that with such consent the Secretary was bound under the Brown-Stephens Act to pay the certified County taxes from the allottees' rental receipts in his possession, which he had failed to do; and, finally, that the County could recover taxes only for years 1969 through 1971 under the limitations period the court deemed applicable. The district court directed payment of each allottee's 1969-71 tax liability from present funds belonging to the individual Indian allottees in the hands of the Secretary. The pertinent issues on which this appeal turns center on: (1) the requirement of the allottees' consent as a precondition to tax payments; (2) the nature of the Secretary's duties under the Brown-Stephens Act; and (3) the mandamus relief granted by the district court.

4 Overdue taxes for years 1965 through 1972 were:

1965—$ 6,392.00; 1966—$ 11,043.88; 1967—$ 14,434.49; 1968—$17,694.63; 1969—$ 28,027.98; 1970—$ 84,316.02; 1971—$95,511.78; 1972—$102,177.37; Total—$359,598.15.

We find that we are in basic agreement with the district court except with regard to the relief granted. In our view, mandamus cannot be employed under the authority of the Brown-Stephens Act to compel the Secretary to withhold and make delinquent tax payments from present funds in connection with which the allottees have not consented to such payments.

II.

The Requirement of Consent.

In the mid-19th century both the Omaha and Winnebago tribes ceded or sold most of their land by treaty to the United States with the exception of reservation lands on which the Indians could live under the protection of the

United States.[5] The treaties that brought the tribes to their present location in Thurston County, Nebraska were either silent as to the tax status of lands retained by the Indians or specified that Indian lands were to be exempt from taxation, levy, sale or forfeiture unless Congress provided otherwise. Furthermore, most of the treaties provided for a division of Indian land in severalty among the individual Indians with the approval and under the supervision of the President or the Secretary of the Interior.

The division of Indian lands in severalty or allotments to individual Indians evolved as a distinct policy of the federal government in the latter half of the 19th century, and though the policy has now long been abandoned, this lawsuit is very much a legacy of the period. *See Mattz v. Arnett*, 412 U. S. 481, 498 (1973); *Conroy v. Conroy*, 575 F. 2d 175, 181 (8th Cir. 1978); *Chase v. McMasters*, 573 F. 2d 1011, 1018 (8th Cir. 1978); *pet. for cert. filed*, 47 U. S. L. W. 3227 (U. S. Sept. 15, 1978) (No. 78-438); 78 Cong. Rec. 11729 (1934) (remarks of Rep. Howard). With the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331, *et seq.*, Congress authorized the executive branch to survey and allot to individual Indians substantially all reservation lands (with certain specified exceptions) suitable for agricultural purposes. 25 U. S. C. § 331; *see* F. Cohen, Handbook of Federal Indian Law 258

5 Treaty with the Winnebago Indians of March 8, 1865, 14 Stat. 671; Treaty with the Omaha Indians of March 6, 1865, 14 Stat. 667; Treaty with the Winnebago Indians of April 15, 1859, 12 Stat. 1101; Treaty with the Winnebago Indians of February 27, 1855, 10 Stat. 1172; Treaty with the Omaha Indians of March 16, 1854, 10 Stat. 1043; Treaty with the Winnebago Indians of October 13, 1846, 9 Stat. 878.

(1942) (hereinafter *Cohen*). The district court found that the Winnebago and Omaha land in question was allotted under terms of the General Allotment Act.[6] Section 5 of the Act provided in pertinent part:

> Upon the approval of the allotments . . . the Secretary of the Interior . . . shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

25 U. S. C. § 348. Under this system the United States retained legal title to each parcel of allotted land as trustee

6 We note that much of the land allotted to Omaha Indians appears to have been originally allotted pursuant to two special allotment statutes in language to the General Allotment Act: Act of August 7, 1882, c. 434, §§ 6, 8, 22 Stat. 341; and Act of March 3, 1893, c. 209, 27 Stat. 612, 630. *See Chase v. United States*, 256 U. S. 1, 5 (1921); Letter from Secretary of the Interior Franklin K. Lane to Representative Stephens (April 15, 1916), *reprinted in* H. R. Rep. No. 1098, 64th Cong., 1st Sess. 1, 2 (1916); A. Fletcher & F. LaFlesche, The Omaha Tribe, vol. 1, 33 (1972). There does not appear to be any functional distinction between the provisions of these statutes and the General Allotment Act, or in the trust patents issued under the respective statutes. Moreover, by its terms the General Allotment Act is applicable notwithstanding the existence of an antecedent special allotment statute. 25 U. S. C. §§ 331, 335. Thus, the focus of this opinion is on the General Allotment Act.

for the individual Indian allottee. The Indian's beneficial interest in the property was recorded on a trust patent which generally reflected the language of the statute.[7] *See United States v. Rickert*, 188 U. S. 432, 436 (1903). Section 6 of the General Allotment Act, 25 U. S. C. § 349, was amended in 1906 to allow the Secretary to issue a patent

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7 A typical trust patent states as follows:

> United States to Lemmon
>
> CERTIFIED COPY OF TRUST PATENT
> THE UNITED STATES OF AMERICA. TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:
>
> WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated September 25, 1893, from the commissioner of Indian Affairs, approved by the Acting Secretary of the Interior September 28, 1893, whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 Stats., 388) Cha shep ska win kaw or Cha shep ska win kaw Lemmon, an Indian residing on the Winnebago Reservation has been allotted the following described land, viz:—
>
> . . . .
>
> NOW KNOW YE, THAT THE UNITED STATES OF AMERICA, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th day of February 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Cha shep ska win kaw or Cha shep ska win kaw Lemmon, or, in case of her decease, for the sole use of her heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by Patent to said Indian, or her heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided: That the President of the United States may, in his discretion, extend the said period.

in fee simple to an allottee before the expiration of the trust period established in Section 5 of the Act upon a determination that the Indian was "competent and capable of managing his or her affairs." Act of May 8, 1906, c. 2348, 34 Stat. 182. The amendment and similar enactments of the period[8] were intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefits derived therefrom for Indians determined to be competent. At the same time, however, by providing that upon issuance of a fee patent "all restrictions as to sale, incumbrance, or taxation . . . shall be removed", Section 6 clarified the intent of Congress in enacting the General Allotment Act that while the period of trusteeship over Indian land lasted, the land was to be held free from all taxes.[9] *Squire v. Capoeman*, 351 U. S. 1, 7-8 (1956).

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8 See Clapp Amendments of 1906 and 1907, 34 Stat. 353, 1034 (applicable to mixed-blood Indians on the White Earth Reservation in Minnesota).

9 Section 6 provides in part:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and *thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent:* . . . (Emphasis added.) 25 U. S. C. § 349

As noted, federal policy no longer favors the allotment of Indian land. *See Conroy v. Conroy, supra,* at 181. Through a succession of executive orders, and now by statute, the trust periods on allotted land have been extended indefinitely. *See* 25 U. S. C. §§ 461, 462.

Before federal policy shifted away from the vigorous attempt to assimilate Indian tribes, a number of cases arose which put in issue individual Indians' obligations to pay State and local taxes in situations where, under the authority of Section 6 of the General Allotment Act or like statutes,[10] a trust was unilaterally terminated and a patent in fee issued before the expiration of the trust period and without the Indian allottee's consent. *See Cohen, supra* at 259. Through a consistent course of adjudication, federal courts held with substantial unanimity that the allottees had a vested property right to tax exemption which could not be terminated without their consent prior to the end of the designated period of trust. *See, e.g., Glacier County v. United States,* 99 F. 2d 733, 734 (9th Cir. 1938); *United States v. Nez Perce County,* 95 F. 2d 232, 234-35 (9th Cir. 1938); *Board of Commissioners of Caddo County v. United States,* 87 F. 2d 55, 56 (10th Cir. 1936); *United States v. Benewah County,* 290 F. 628, 631 (9th Cir. 1923); *Morrow v. United States,* 243 F. 854, 855-56 (8th Cir. 1917); *United*

10 *See Mahnomen County v. United States,* 131 F. 2d 936, 938 (8th Cir. 1942), *rev'd on other grounds,* 319 U. S. 474 (1943). *See also* 25 U. S. C. § 372.

The policy in favor of promoting the conveyance of fee patents to Indians was later reversed and the Secretary of the Interior was provided with the authority to cancel fee patents and in effect restore the trust where such patents were issued without the consent or application of the allottee. See 25 U. S. C. § 352a.

States v. Ferry County, 39 F. Supp. 1007, 1012 (E. D. Wash. 1941); *United States v. Board of County Commissioners of Pawnee County,* 13 F. Supp. 641, 642 (N. D. Okla. 1936); *United States v. Board of Commissioners of Comanche County,* 6 F. Supp. 401, 402-03 (W. D. Okla. 1934); *Cohen, supra* at 259. *See also Mahnomen County v. United States,* 319 U. S. 474, 476-77 (1943); *Kirkwood v. Arenas,* 243 F. 2d 863, 869 (9th Cir. 1957); *State v. Zay Zah,* 259 N. W. 2d 580, 584-85 (Minn. 1977). The operative expression common to nearly all allotment statutes and trust patents on which the vested right to tax exemption was necessarily predicated was the government's promise to convey the land in fee at the expiration of the trust "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U. S. C. § 348. *E.g., United States v. Nez Perce County, supra* at 235. *See Squire v. Capoeman, supra* at 7.

In the main, the cases recognizing a vested right to tax exemption relied on a logical extension of the contract law principles articulated by the Supreme Court in a 1912 case, *Choate v. Trapp,* 224 U. S. 665 (1912). *Choate* involved state taxation of Choctaw and Chickasaw allotment lands in Oklahoma pursuant to a federal statute which vitiated an earlier enactment providing that "the land should be non-taxable." *Id.* at 670. The Supreme Court held that the Indians had a vested property right to tax exemption, reasoning that the exemption was part of the quid pro quo received by the Choctaws and Chickasaws in return for relinquishment of their equitable interest in tribal lands. *Id.* at 671-73, 678-79.

The district court likewise relied on *Choate v. Trapp,* and its progeny in holding that under the General Allotment Act the allottees had a vested right "to hold the trust

patent lands as tax exempt property during the period of the trust." Thus, the district court applied the vesting principle to the present indefinite extension of the trust periods. *See Allbaugh v. United States*, 184 F. 2d 109, 114-15 (8th Cir.) *cert. denied*, 340 U. S. 905 (1950); *Board of Commissioners of Jackson County v. United States*, 100 F. 2d 929, 933 (10th Cir. 1938), *modified*, 308 U. S. 343 (1939). We believe the district court correctly did so.

This Court has twice before adhered to the basic position that Indian allottees enjoy a vested right to tax exemption on lands held in trust under the General Allotment Act in situations where a unilateral termination of the trust has been attempted without the consent of the individual allottee. *See Mahnomen County v. United States*, 131 F. 2d at 938; *Morrow v. United States, supra* at 856. In our opinion, these cases and the weight of authority they represent, as well as more recent Supreme Court pronouncements in the area, compel the conclusion that the Omaha and Winnebago allottees have a property right to enjoy their allotted land free from state and local taxation while it is held in trust under the original trust patents.

The sources of this property right are twofold and closely related. First, viewing the pertinent treaties, trust patents, allotment statutes, and prevailing notions of the day together, we believe the original allottees should be considered to have exchanged their tribal rights for an allotted interest in reservation land, and as a result acquired an enforceable expectation that their allotments would be tax exempt while held in trust by the United States. Second, a right to tax exemption was part of the beneficial interest created in the allottees by trust patents issued pursuant to the General Allotment Act. In this respect, the

trust established by the federal government was akin to a spendthrift trust which also ran to taxes on the res. The confluence of trust and contract law principles applied against the backdrop of the unique relationship between the federal government and the Indians convinces us that the original allottees and their heirs have a property right in the tax exemption of their lands which exists while the lands are held in trust under the original trust patents.

The sources of a contract or agreement between the Indians and the United States would here be found in the treaties with the Omahas and Winnebagos, the trust patents, and the terms of the General Allotment Act. *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148 (1973)." Most of the treaties pertinent to this action provided for the cession or sale of tribal lands to the United States in return for reserved land which, as recited in the treaties, could be distributed in severalty to individual Indians, plus the payment of cash and/or various other forms of consideration. Such land was also generally stipulated to be tax exempt unless otherwise provided by Congress. *See, e. g., Treaty with the Omaha Indians,* March 6, 1865, art. IV, 14 Stat. 667. Thus, the treaties generally reflect the rudiments of a contract between the tribes and the United States, and contemplate both the tax exemption and allotment of reserved land. *See Board of Commissioners of Jackson County v. United States,* 308 U. S. 343, 348-49 (1939). The treaties, coupled with the promise in the trust patents and the General Allotment Act to convey the land in fee "free of all charge or incumbrance whatsoever" at the conclusion of the trust period, when

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11 See notes 5-7, 9 *supra* and accompanying text.

viewed together, may well be said to reflect a mutual understanding between the tribes and the federal government that the trust lands would be exempt from taxation during the period of trusteeship. *See Morrow v. United States, supra* at 856-58. *See also Bryan v. Itasca County,* 426 U. S. 373, 392 (1976); *Squire v. Capoeman, supra* at 7. This conclusion finds additional support in the 1910 debate on the predecessor to the Brown-Stephens Act—the Brown Act—in which concern was expressed that taxation of Indian trust lands would be inconsistent with the "well-defined" policy "to let the taxation . . . begin with the expiration of the trust period." 45 Cong. Rec. 5449, 5450 (1910) (remarks of Representative Carter). Considering the treaties, allotment statutes and trust patents in light of the fact that tax exemption for Indian trust land was clearly one of the prevailing notions of the day which permeated Indian affairs, it is reasonable to believe the Winnebago and Omaha tribes, and through them the allottees, had an enforceable expectation that the allotted reservation land received in return for relinquishment of rights in ceded tribal lands was to be exempt while held in trust. *See Oliphant v. Suquamish Indian Tribe,* — U. S. —, —, 98 S. Ct. 1011, 1019 (1978); *Sweet v. Schock,* 245 U. S. 192, 196 (1917); *Choate v. Trapp, supra* at 671-73.

Apart from contract principles, the language of the General Allotment Act and trust patents reflects an intent to grant state and local tax exemptions as part of the beneficial interest enjoyed by the allottees and their heirs. In *Squire v. Capoeman, supra,* the Supreme Court dealt with a federal capital gains tax imposed on the sale of timber taken from allotted land. The allottee in *Squire* held his interest by virtue of extensions to the original

trust period under executive order and 25 U. S. C. § 462, the same as in the instant case. *Id.* at 3-4 & n. 4. The *Squire* Court held that the tax was foreclosed under its interpretation of the General Allotment Act, particularly Section 6 of the Act, 25 U. S. C. § 349, which provides that a patent in fee eliminates "all restrictions as to sale, incumbrance, or taxation."[12] In discussing the effect of that section, the Court observed:

> The literal language of the proviso evinces a congressional intent to subject an Indian allotment to taxes *only* after a patent in fee is issued to the allottee. This, in turn, implies that, *until such time as the patent is issued,* the allotment shall be free from all taxes, both those in being and those which might in the future be enacted. (Emphasis added.)

Id. at 7-8. The Supreme Court also noted, in line with the reasoning of the earlier vested rights cases cited previously, that language in Section 5 of the Act, 25 U. S. C. § 348, to the effect that the United States must ultimately transfer the land in fee "free of all charge or incumbrance whatsoever" supports a similar conclusion. If, as *Squire* holds, Congress intended that allotments were to be tax free until a fee patent was issued, then it seems to us that while the trust continues, the individual Indian's property interest in an allotment acquired by virtue of the federal government's declaration of trust included the tax exemption feature. Since State and local governments may tax Indian trust lands only with the consent of Congress, *e. g., Mescalero Apache Tribe v. Jones, supra* at 148, Congress clearly was empowered

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12 See note 9, *supra*.

to create a property right to local tax exemption as part of the package of rights enjoyed by individual allottees for whom a trust patent was issued.

In concluding that the allottees have a property right to hold their allotted land free of taxes, we are also influenced by the peculiar fiduciary role played by the federal government as trustor and trustee of the allotted trust land, and as historic guardian of the Indian tribes. *See, e. g., Oliphant v. Suquamish Indian Tribe, supra* at 1020 n. 17; *Rosebud Sioux Tribe v. Kneip,* 430 U. S. 584, 586 (1977); *Chase v. McMasters, supra* at 1017. Because of this relationship, where there is legitimate doubt about the rights conferred under a trust declared for the benefit of individual Indian allottees, the terms thereof must be construed in favor of the Indians. *E. g., McClanahan v. Arizona State Tax Commission,* 411 U. S. 164, 174 (1973). Of course, the allottees do not enjoy tax exemption in perpetuity. The current trusts exist only by virtue of repeated extensions which are subject to legislative termination. Moreover, our opinion does not foreclose imposition of a possessory interest tax on the leasehold interest of allotted land. *See Fort Mojave Tribe v. San Bernadino County,* 543 F. 2d 1253, 1256 (9th Cir. 1976), *cert. denied,* 430 U. S. 983 (1977). We hold only that the allottees have a vested right to consent or object to the payment of taxes under what may fairly be construed as the original declaration of trust while such declaration continues to define rights and responsibilities as between the federal government and the allottees. *See generally Northern Cheyenne Tribe v. Hollowbreast,* 425 U. S. 649, 655-56 (1976); *Sizemore v. Brady,* 235 U. S. 441, 449-50 (1914).

The final question is whether, as the County would enforce it, the Brown-Stephens Act is inconsistent with the allottees' vested rights. On its face the Act permits assessment and collection of State and local taxes on land held in trust by the United States for the Winnebago and Omaha Indians. *See* H. R. Rep. No. 1098, 64th Cong., 1st Sess. (1916). The Act does not literally permit a tax *on land* in the usual property law sense because delinquencies can be enforced only against rental income, and not realty. Nonetheless, in practical effect whatever is collected pursuant to the Brown-Stephens Act amounts to a tax on land. As the district court found, the allottees bear any tax burden imposed by Brown-Stephens, for tax payments are conceptually a part of rent owed by the lessee to the lessor. *See Allbaugh v. United States, supra* at 112. *Cf. Oklahoma Tax Commission v. Texas Co.,* 336 U. S. 342, 353 (1949). That the taxes are to be paid from the Indians' rental income from their land is immaterial, for any tax exemption on allotted land would also extend to rental income from which the property tax is deducted. *See Squire v. Capoeman, supra* at 9. Indeed, from the allottees' perspective, the tax authorized under Brown-Stephens is akin to a tax on the privilege of renting the land, a privilege obviously a part of the use of the land itself. *Mescalero Apache Tribe v. Jones, supra* at 158. The Brown-Stephens Act therefore embodies a procedure for the collection of local taxes of a type the allottees would normally be exempt from. *Cf. United States v. Mason,* 412 U. S. 391, 394-96 (1973); *McClanahan v. Arizona State Tax Commission, supra* at 80-81.

At the same time, however, there is no suggestion in either the language or history of the Brown-Stephens Act

that it was intended to alter any vested interest of the allottees. In the only previous case to have considered the Act, *Allbaugh v. United States, supra,*[13] this Court noted that Brown-Stephens is capable of being construed as embracing "an implied right in the allottee to permit . . . payments to be made in any case where . . . consent might be necessary." *Id.* at 115. No party argues that the Indians may not voluntarily consent to the payment of otherwise exempt taxes if they wish to, as it is clear that they may. *See Mahnomen County v. United States,* 319 U. S. at 477; *Allbaugh v. United States, supra* at 115. Thus, we conclude that the Brown-Stephens Act should be viewed as permitting non-lienable and non-obligational tax assessments against Indian trust land, and providing for the payment of such assessments out of rental funds in the Secretary's control if the allottee or his heirs consent to the payment.

Duties of the Secretary.

The Omaha and Winnebago tribes argue that the district court erred in concluding that the Secretary had a mandatory duty to disburse funds under the scheme provided in the Brown-Stephens Act upon the consent of the Indians to taxation. The tribes argue that the Secretary had an independent duty, derived from the policy supporting the General Allotment Act, to insure that any payments to Thurston County eventually inure to the benefit of the allottees. The use of the words "shall be authorized" to describe the Secretary's function under the Brown-Stephens Act is said to evince congressional recognition of this duty and an intent to preserve it by vesting the Secretary with discretion. The Secretary has not appealed.

The majority of this panel rejects the tribes' argument[14] and believes if the Brown-Stephens Act is to be

13 *Allbaugh* involved a suit by the United States to recover unpaid taxes from a lessee of allotted land who by lease had agreed to pay such taxes as part of rent. The lessee appealed an adverse district court judgment, *inter alia,* on the ground that the Brown-Stephens Act was unconstitutional as an infringement of the Indians' vested right to tax immunity. This Court found it unnecessary to address the issue principally because the allottees in question had consented to payment of taxes by providing for such payment in the lease. 184 F. 2d at 114-15.

14 The author of the panel opinion is unable to join in this aspect of the Court's holding. However, because the resolution of this appeal does not turn on the nature of the Secretary's duty under the Brown-Stephens Act, I have confined articulation of my views to a footnote. The panel is unanimous on all other points.

The Brown-Stephens Act provides that upon certification by the county treasurer of unpaid and overdue taxes on Indian land, the Secretary "shall be authorized to pay the same" from rental funds in his control belonging to the Indians. It is axiomatic that an action in the nature of mandamus can only lie if the duties sought to be enforced are "ministerial duties of a non-discretionary nature," *Panama Canal Co. v. Grace Line, Inc.,* 356 U. S. 309, 318 (1958), which are plainly defined and peremptory. *See, e. g., Schulke v. United States,* 544 F. 2d 453, 455 (10th Cir. 1976); *Rural Electrification Administration v. Northern States Power Co.,* 373 F. 2d 686, 694-95 n. 14 (8th Cir.), *cert. denied,* 387 U. S. 945 (1967). In the context of Indian affairs, I cannot agree that a plainly defined duty admitting of no discretion is imposed on the Secretary by statutory language which "authorized" him to pay delinquent county taxes, *see Creek Nation v. United States,* 318 U. S. 620, 639 (1943), and more importantly, I discern no such duty in the limited and ambiguous legislative history of the Brown-Stephens Act. *See* H. R. Rep. No. 1098, 64th Cong., 1st

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Sess. (1916) (the House and Senate reports on the Act were identical); 45 Cong. Rec. 5449 (debate on the substantially identical predecessor to the Brown-Stephens Act, the Brown Act, Act of May 6, 1910, c. 202, 35 Stat. 348). Suffice it to say that the inferences to be gained are conflicting; the relevant debates, such as they were, tend to favor a mandatory duty, the committee reports implicitly favor discretion. *See Housing Authority of City of Omaha v. United States Housing Authority*, 468 F. 2d 1, 6-7 n. 7 (8th Cir. 1972), *cert. denied*, 410 U. S. 927 (1973). For me, the absence of a clearly prescribed mandatory duty means that the Secretary may not be compelled to make payments through mandamus.

I would not adhere to this position if it ran against the obvious tenor of the Act; however, in view of the circumstances prevailing when Brown-Stephens was enacted in 1916, it is perfectly reasonable to believe that Congress intended to simply authorize the Secretary to pay delinquent taxes to Thurston County when to do so would be mutually beneficial to the County and the Indians. *See Allbaugh v. United States, supra* at 111 n. 1, 116. The severe financial crisis in Thurston County caused by large amounts of tax exempt land and which precipitated enactment of the Brown-Stephens Act, was unlikely to have been considered a problem of long duration in view of the then prevailing federal policy promoting the issuance of patents in fee. As a consequence, the Act is stamped with the qualities of an interim measure. *See* H. R. Rep. No. 1098, 64th Cong., 1st Sess. 2, 3 (1916). *See also* S. Rep. No. 397, 61st Cong., 2nd Sess. (1910). Moreover, as the district court implicitly recognized in its judgment entry, there is an obvious potential for hardship to individual Indians in a mechanical application of the Act. Thus the district court allowed the Secretary an option to distribute tax payments from rentals over a period of years in cases where a lump sum deduction from rent would have been "unnecessarily harsh." So, too, in the ordinary operation of the Act, by the time the County certifies delinquent taxes, some allottees who theretofore consented to the payment of taxes may be in such a position that deductions from their rents for payments would threaten rather than enhance the allottees' welfare. In recognition of the fiduciary obligations of the federal government to these Indians, it seems to me that Congress may well have

(Continued on next page)

given any viability it must be construed so as to require the Secretary to pay out rental funds in his possession during the time that the statute declares the duty to exist. Moreover, in the majority's view, this Court implicity held that Brown-Stephens imposed a nondiscretionary duty in *Allbaugh*. The *Allbaugh* court, in a suit involving recovery of the tax portion of rent under a lease of allotted land, recognized that technically the right to recover rent in the form of unpaid taxes belonged to the allottees. Nevertheless, this Court directed modification of the district court's judgment to require that the delinquent tax money be paid into the registry of the court for direct disbursement to Thurston County. 184 F. 2d at 116. By directing payment to the County rather than to the allottees or Secretary, the *Allbaugh* court sought to effectuate congressional intent that the Brown-Stephens Act "be an instrument for bringing revenue into the treasury of Thurston County, as a means of furthering the

(Continued from previous page)

intended to reserve some discretion in the Secretary to decline to make payments or to make partial payments of certified delinquent taxes where to do so would better effectuate the symbiotic purposes of the Brown-Stephens Act—the mutual benefit of Thurston County and the many allottees who hold land there. In my judgment, the failure of the Secretary to make a determination in this regard is the true source of complaint here, not his failure to pay delinquent taxes per se.

I do not believe *Allbaugh* requires a different result. The Court there *sua sponte* modified the judgment entry in apparent response to the government's dissembling about what it intended to do with recovery. The question before us was not presented or discussed. Under these circumstances, I do not believe the implications of the *Allbaugh* judgment entry should be controlling.

welfare and advantage of the Indian allottees and of benefitting their properties." *Id.* The rationale employed in this aspect of the *Allbaugh* decision applies with equal force here.

Accordingly, if the Secretary has funds from the rentals of allotted land in his control from which an allottee has consented to the payment of taxes, he is obligated to make payments of delinquent taxes pursuant to the statutory scheme set forth in the Act within a reasonable time after certification of delinquent taxes by the County.

The District Court Remedy.

The district court issued a writ of mandamus directing the Secretary to pay each allottee's proportionate share of certified delinquent taxes for 1969, 1970, and 1971 from funds belonging to allottees and in the Secretary's control. In the event any allottee had insufficient funds on deposit with the Secretary to satisfy payment of his or her individual share of consented-to taxes, the Secretary was directed to pay the balance from rental income received by the allottee over a three-year period. Payment of the balance could be made in lump sum or distributed over the three-year period in the Secretary's discretion.

From the record before us it appears that rents allocated to taxes from pre-1972 leases have been distributed to the allottees' general IIM accounts and presumably have been withdrawn by the allottees or comingled with other funds in the IIM accounts over time. Therefore, implicit in the district court's judgment is the conclusion that the Secretary was empowered to pay delinquent taxes out of funds from which the allottees had not consented to the payment of taxes. The view we take of the authority conferred by the Brown-Stephens Act does not allow the remedy granted by the district court. While it may be true that Thurston County was wrongfully deprived of funds as a collateral result of the Secretary's failure to properly exercise his responsibilities under the Act, the allottees cannot be visited with the consequences of that failure through a mandamus action which, by its very nature, only enforces duties imposed by the statute. *See, e.g., Billiteri v. Board of Parole,* 541 F. 2d 938, 946 (2d Cir. 1976).

While formally and technically a mandamus judgment against the Secretary, it is clear that in operation the district court's judgment is directed at the allottees with the office of the Secretary employed as a device to extract funds from the allottees which are no longer in the Secretary's possession; viz., rents from pre-1972 leases. This result is at odds with the limited authority granted by the Brown-Stephens Act and, in fact, enables the County to indirectly impose liability on the allottees when it is clear that it could not do so directly. We have held that the Brown-Stephens Act creates a mechanism for the payment of delinquent real property taxes from rental receipts in the Secretary's possession if the allottees have given their consent to such payment. The Act does not create a cause of action for delinquent taxes; nor does it impose any form of inchoate liability on the Indians. There is, in short, no authority for deducting tax payments from the allottees' rental income unless they have consented to the use of that income to pay

taxes. Since the funds from which the allottees consented to a deduction for taxes have been distributed, and the Indians have not consented to payments in leases since 1972, there is no way to recapture the money from individual allotttees through a mandamus action to enforce the Secretary's duties under the Brown-Stephens Act.

We sympathize somewhat with the district court's attempt to grant some limited recoupment to the County. The County, in what has apparently been the first contested attempt to enforce the Brown-Stephens proviso,[15] has seen a regular flow of revenue cease as the allottees asserted their rights. But neither this fact, nor the fact that the Secretary failed to act properly upon the County's certifications, broadens the scope of the Secretary's authority under the Brown-Stephens Act or subjects the allottees to individual liability for delinquent taxes. The Secretary no longer has rental funds in his possession from which the allottees consented to deductions for delinquent taxes. The money having been distributed to the allottees, and there existing no cause of action against the allottees for delinquent taxes, the Brown-Stephens Act cannot be employed to effect deductions from present rental income against the Indians' consent.

---

15 Prior to this case the Secretary appears to have consistently treated a portion of the rent on allotment leases as taxes due Thurston County, and to have paid the same on a regular basis to the County.

Accordingly, we vacate the district court's judgment issuing a writ of mandamus directed to the Secretary.[16] Because the relief sought by the County was peculiarly in the nature of mandamus, this disposition effectively terminates the litigation.[17]

Judgment vacated and the cause is remanded with directions to enter judgment denying issuance of a writ of mandamus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

16 Our holding that the Secretary may not pay past consented-to taxes from present rental income against the allottees' consent makes it unnecessary for us to consider the County's challenge to the district court's holding that the pertinent statute of limitations limited the County in most cases to recovery of taxes for tax years 1969, 1970, and 1971.

17 Though we hold mandamus relief is unavailable because the funds subject to such relief have been distributed to the allottees, this cause of action is not moot. First, our holding that the Indians have the right to consent or object to the tax payments is a necessary predicate to any finding of mootness as it relates to other issues. Second, with regard to the Secretary's duties, we are satisfied that this cause falls into the narrow category of cases in which a problem is capable of repetition, yet evading review. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 515 (1911). Further, the issue is of sufficient public importance to command our attention. *Bright v. Taylor*, 554 F. 2d 854, 859 (8th Cir. 1977).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1790

September Term, 1978

COUNTY OF THURSTON, STATE OF NEBRASKA,

Appellant,

vs.

CECIL ANDRUS, SECRETARY OF INTERIOR, UNITED STATES OF AMERICA, WYMAN A. BABBY, AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR, AND FLOYD R. THIEMAN, ACTING SUPERINTENDENT, WINNEBAGO AGENCY BUREAU OF INDIAN AFFAIRS,

Appellees,

THE OMAHA TRIBE OF INDIANS AND THE WINNEBAGO TRIBE OF INDIANS,

Intervenors-Appellees.

No. 77-1808

COUNTY OF THURSTON, STATE OF NEBRASKA,

Appellee,

vs.

CECIL ANDRUS, SECRETARY OF INTERIOR, UNITED STATES OF AMERICA, WYMAN A. BABBY, AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR, AND FLOYD R. THIEMAN, ACTING SUPERINTENDENT, WINNEBAGO AGENCY BUREAU OF INDIAN AFFAIRS,

THE OMAHA TRIBE OF INDIANS AND THE WINNEBAGO TRIBE OF INDIANS,

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JUDGMENT

(Filed November 6, 1978)

This Cause came on to be heard on the record from the United States District Court for the District of Nebraska and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions to enter judgment denying issuance of a writ of mandamus.

November 6, 1978

APPENDIX B

GENERAL ALLOTMENT ACT OF FEBRUARY 8, 1887

24 Stat. 388 c. 119

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order

of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if anyone entitled to an allotment shall fail to make a

selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for

such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situated shall apply thereto after patents therefor have

been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said

lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and

every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choc-

taws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

BROWN ACT

CHAP. 202.—An Act Providing for the taxation of the lands of the Omaha Indians in Nebraska.

Be it enacted . . . That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued prior to eighteen hundred and eight-five be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and state purposes as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: *Provided,* That such lands so long as held under a trust patent shall not be subject to levy and tax sale as provided under the laws of the State of Nebraska for the collection of such taxes, but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of all such unpaid and delinquent taxes on such lands of the Omaha Indians may be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a release and discharge of the tax assessed against the land of the Indian so without funds.

Approved, May 6, 1910.

STEPHENS ACT

CHAP. 10—An Act Providing for the taxation of the lands of the Winnebago Indians and the Omaha Indians in the State of Nebraska.

Be it enacted . . . That all of the lands in the State of Nebraska belonging to the members of the tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five-year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska, now in force or to be hereafter enacted.

Section 2—That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: *Provided,* That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska for the collection of such taxes; but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago

Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds.

Approved, December 30, 1916.

Supreme Court, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1196

COUNTY OF THURSTON, STATE OF NEBRASKA, *Petitioner,*

v.

CECIL ANDRUS, SECRETARY OF INTERIOR, UNITED STATES OF AMERICA, WYMAN A. BABBY, AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR, and FLOYD R. THIEMAN, ACTING SUPERINTENDENT, WINNEBAGO AGENCY, BUREAU OF INDIAN AFFAIRS, and THE OMAHA TRIBE OF INDIANS and THE WINNEBAGO TRIBE OF INDIANS, *Respondents.*

BRIEF OF THE OMAHA AND WINNEBAGO TRIBES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF OF THE OMAHA AND WINNEBAGO TRIBES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents submit that Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied for the following reasons:

1. The opinions of both the lower courts [the Court of Appeals and the District Court] correctly rely on important Indian law principles recognizing vested allotment tax immunities established by this Court in

United States v. *Rickert,* 188 U.S. 432 (1903); *Choate* v. *Trapp,* 224 U.S. 665 (1912), and *Squire* v. *Capoeman,* 351 U.S. 1 (1956).

2. Similarly the opinions below rely on longstanding decisions of this Court which hold that once the allotment tax immunity vests an allottee must consent to any subsequent taxation. *Sweet* v. *Schock,* 245 U.S. 192 (1917); *Mahnomen County* v. *United States,* 319 U.S. 474 (1943).

3. The opinions below are of narrow applicability. This case is not of national importance and affects only the parties involved in the Brown-Stephens Act, Act of December 30, 1916, Pub.L. No. 291, 39 Stat. 865 —Thurston County, Nebraska and Indian allottees who are members of the Omaha and Winnebago Tribes.

4. This case is not one of first impression. Both the Court of Appeals and the District Court expressly relied on a twenty-eight-year old case which considered the tax liabilities of Indian allottees under the Brown-Stephens Act. *Allbaugh* v. *United States,* 184 F.2d 109 (8th Cir. 1950), *cert. denied,* 340 U.S. 905 (1950).

For the above reasons, respondents submit that the Writ of Certiorari should be denied.

DATED: February 28, 1979.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 27 1979
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No. 78-1196

In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNTY OF THURSTON, NEBRASKA, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-51) is reported at 586 F. 2d 1212. The opinion of the district court (Pet. App. 1-20) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52-53) was entered on November 6, 1978. The petition for a writ of certiorari was filed on February 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of May 6, 1910, ch. 202, 36 Stat. 348, as amended by the Act of December 30, 1916, ch. 10, 39

Stat. 865 (Brown-Stephens Act), is set forth at Pet. App. 62-64. The General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, is set forth at Pet. App. 54-61.

QUESTION PRESENTED

Whether, under various Indian treaties and federal statutes, petitioner can tax land held in trust by the United States for the benefit of Omaha and Winnebago Indians without the Indians' consent.

STATEMENT

In this case petitioner, the County of Thurston, Nebraska, claims the right to impose a property tax on certain lands that are held in trust by the United States for members of the Omaha and Winnebago Indian Tribes and that have been leased to third parties. Petitioner seeks to compel the Secretary of the Interior to pay petitioner sums representing alleged tax deficiencies for those lands.

1. In the mid-19th century, the Omaha and Winnebago Tribes ceded most of their land to the United States by treaties, retaining reservation lands in the County of Thurston and elsewhere (Pet. App. 31-32). In 1887, pursuant to the then federal policy of Indian assimilation, Congress enacted the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* Under the Act, the Secretary was authorized to allot reservation lands to individual Indians. The allotments were to result in fee simple patents, "free of all charge or incumbrance whatsoever" (25 U.S.C. 348), after a certain period during which the land was to be held in trust for the allottee by the United States (*ibid.*). The Act provided that the trust period was to be 25 years, commencing with the Secretary's approval of the allotment, or any longer period that the President provided (*ibid.*). The trust periods were subsequently extended indefinitely by statute, and the lands at issue in this case are still held in trust by the United States (25 U.S.C. 461, 462; Pet. App. 36).

Decisions of this Court and the lower federal courts have consistently held that the Allotment Act and the original Indian treaties intended to exempt lands held in trust from taxation. See, *e.g.*, *Squire* v. *Capoeman*, 351 U.S. 1, 6-10 (1956). Relying on this Court's decision in *Choate* v. *Trapp*, 224 U.S. 665 (1912), the lower federal courts have also consistently held that Indian treaties ceding land to the United States, together with the Allotment Act, gave allottees of trust land a vested right to tax exemption during the trust period unless the allottees consented to taxation—a right that could not be abrogated by federal statute without just compensation. (See page 6, *infra*, and cases cited.)

In 1916 Congress enacted the Brown-Stephens Act, ch. 10, 39 Stat. 865 (Pet. App. 63-64), dealing specifically with Omaha and Winnebago trust lands in Nebraska. That Act provides that such lands are "subject to [tax] appraisement and assessment * * * and subject to [state and local] taxation * * *" (Section 1). It further provides, however, that so long as they are held in trust, such lands "shall not be subject to levy and tax sale * * *" (Section 2). Instead, it provides an alternative means of collection: If the taxes are not paid on time, the county treasurer may certify the delinquencies

> to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed * * *. [*Ibid.*]

2. There are 34,000 acres of trust land in Thurston County, and since the enactment of the Brown-Stephens Act, petitioner has assessed and collected taxes on the

portion of that land—some 18,000 acres—that has been leased to non-Indians.[1] In most instances, the leases issued before 1972 provided for the payment of rent and of state and local taxes by the non-Indian lessees. Most leases provided for both the rent and the tax payments to be made directly to the BIA office. Under this arrangement, the money received by the BIA was placed into two separate accounts: Special Deposit Accounts (SD Accounts), which held the money for local taxes, and Individual Indian Money Accounts (IIM Accounts), which held the rental money. Funds in IIM Accounts may be withdrawn by adult Indians on request, subject to certain minor restrictions. 25 C.F.R. 104.3 (Pet. App. 27-28).

In 1972, at the Tribes' request, the BIA stopped paying county taxes on trust lands.[2] In addition, the BIA removed the tax collection provision from new lease agreements and stopped establishing new SD Accounts. Funds remaining in the SD Accounts were transferred to the IIM Accounts (Pet. App. 28-29).

Since 1972, the County Treasurer has certified lists of overdue taxes for the years 1965-1972 to the Secretary of the Interior, as provided by the Brown-Stephens Act. The

[1]The leasing of trust property is authorized under regulations prescribed by the Secretary of the Interior; individual leases are approved by the local office of the Bureau of Indian Affairs (Pet. App. 28).

[2]The request was made because of the Tribes' general dissatisfaction with county services and, in particular, road maintenance. In response to the Tribes' request, the BIA surveyed the individual allottees to determine whether any of them wished to continue payment. Only a handful of allottees agreed to continued taxation. Silence was construed as a lack of consent (Pet. App. 28-29 & n.3).

Secretary took no action concerning the overdue taxes for 1965 to 1970. In 1973 and 1974, the Secretary certified that funds were not available for payment of the 1971 and 1972 taxes. At the time of the County Treasurer's first certification in March 1972, however, there were funds available in the SD Accounts for tax payments. Failing to obtain payment, petitioner sought a writ of mandamus to compel the Secretary to pay $359,598.15 in overdue taxes from funds in his control, and to require the Secretary to retain funds received from rents for any future tax delinquencies (Pet. App. 30).

3. Following a trial, the district court held that Omaha and Winnebago trust allottees have a vested right to be exempt from taxation during the trust period, which the Brown-Stephens Act did not abrogate (Pet. App. 9-11). The court also held that most allottees, through their lease agreements, had consented to taxation before April 1972, but that they had effectively revoked their consent thereafter (Pet. App. 12). The court concluded that petitioner was entitled to payments for overdue taxes from the Secretary for the years 1969, 1970, and 1971,[3] and ordered the Secretary to make those payments from rental funds currently in his control (Pet. App. 20).[4]

The court of appeals affirmed the district court's conclusions of law (Pet. App. 24-48), but vacated the order requiring the Secretary to make payments to petitioner. The order was vacated on the ground that, without the allottees' consent, the district court had no authority to order taxes to be paid from the allottees' current rental income (Pet. App. 48-51).

[3]The court held that petitioner's claims for years before 1969 were barred by the statute of limitations (Pet. App. 18-19).

[4]The court's order also provided that if the funds currently in the Secretary's control were insufficient to satisfy the delinquencies, the Secretary should pay the deficiency from rents received on behalf of the allottees over the next three years (Pet. App. 22).

ARGUMENT

Petitioner seems to contend (Pet. 10-13) that the court of appeals erred in holding that the Indian allottees in this case acquired a vested property right in exemption from taxes on trust lands (*i.e.*, a right that could not be abrogated by federal statute without compensation to the allottees), and in holding that the Brown-Stephens Act was not intended to abrogate that right. Petitioner apparently claims that the tax exemption acquired by the allottees was subject to abrogation without compensation, and that the Brown-Stephens Act had that effect.

Petitioner's claims are incorrect. In any event, they involve no questions of general importance and no conflict among the circuits, and they do not warrant this Court's review.

1. The court of appeals' holding that the original Indian treaties and the General Allotment Act of 1887 gave the allottees a property right in exemption from taxes on trust lands is in accord with a long and consistent line of cases based on this Court's decision in *Choate* v. *Trapp*, *supra*. See *Glacier County* v. *United States*, 99 F. 2d 733, 734 (9th Cir. 1938); *United States* v. *Nez Perce County*, 95 F. 2d 232, 234-235 (9th Cir. 1938); *Board of Commissioners of Caddo County* v. *United States*, 87 F. 2d 55, 56 (10th Cir. 1936); *United States* v. *Benewah County*, 290 F. 628, 631 (9th Cir. 1923); *Morrow* v. *United States*, 243 F. 854, 855-856 (8th Cir. 1917); *Board of Commissioners of Jackson County* v. *United States*, 100 F. 2d 929, 933 (10th Cir. 1938), modified, 308 U.S. 343 (1939); *Minnesota* v. *Zay Zah*, 259 N.W.2d 580, 584-585 (Sup. Ct. Minn. 1977), cert. denied, 436 U.S. 917 (1978). See also *Mahnomen County* v. *United States*, 319 U.S. 474, 476-477 (1943); *Kirkwood* v. *Arenas*, 243 F. 2d 863, 869 (9th Cir. 1957). As the court of appeals properly concluded, the allottees' right to be exempt from taxation is derived from a "confluence of

trust and contract law principles applied against the backdrop of the unique relationship between the federal government and the Indians" (Pet. App. 39).

Petitioner does not challenge the principles established and applied in *Choate* v. *Trapp* and other cases, but argues that they were misapplied to the particular facts and circumstances of this case (Pet. 10-12). Petitioner, however, does not demonstrate how the facts of this case are materially different from the other cases in which those principles have been applied. In any event, reviewing the application of settled principles to the particular facts of a case is not an appropriate task for this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Moreover, although the court of appeals concluded that the allottees in this case have a vested property right to tax exemption, this case presents no question of the power of Congress to abrogate that exemption (or of the allottees' remedy in the event that Congress did so). For the court of appeals also held, correctly, that Congress had not abrogated that exemption by the Brown-Stephens Act.[5]

2. Petitioner also apparently contends (Pet. 12-13) that the court of appeals erred in concluding that the Brown-Stephens Act did not intend to subject trust lands to county taxation without the allottees' consent. The court's conclusion was consistent with its earlier decision in *Allbaugh* v. *United States*, 184 F. 2d 109 (8th Cir.), cert. denied, 340 U.S. 905 (1950), and was correctly based on its determination (Pet. App. 43-44) that "there is no suggestion in either the language or history of the Brown-

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[5]If allottees have a vested property right in tax exemption and Congress had in fact abrogated that right by statute, the allotees would presumably have a right to compensation enforceable in the Court of Claims. See *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968).

Stephens Act that it was intended to alter any vested interest of the allottees."[6] Petitioner offers no reasons or arguments in support of its contrary contention.

3. Finally, petitioner argues (Pet. 13-14) that review is warranted to consider the financial ramifications of the court of appeals' decision for a county such as Thurston. The argument is unfounded. Lessees of Indian property in many instances are subject to state taxation (see *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342 (1949)), and the court of appeals specifically noted (Pet. App. 42) that its determination did not foreclose the assessment and collection of a tax on the leasehold interest in allotted lands held by lessees. See, *e.g.*, *Fort Mojave Tribe* v. *San Bernardino County*, 543 F. 2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).

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[6]As this Court said with respect to a similar question in *Menominee Tribe* v. *United States*, *supra*, 391 U.S. at 413 (footnote omitted): "We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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